United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: March 28, 2006

TO : Helen E. Marsh, Regional Director
Region 3

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Eastern Heating and Cooling, Inc.
Case 3-CA-25593

Plumbers and Steamfitters Local 7
(Eastern Heating and Cooling, Inc.)
Case 3-CB-8443

347-6020-5033
393-6061-3350
420-1236
530-4850-3350
530-6067-4001-1750
536-2501-8000
536-2564

These cross-filed Section 8(a)(5) and Section 8(b)(1)(A) and (B) cases were submitted for advice as to whether either the Local Union or the Employer violated the Act by the Local's attempt to apply its local agreement to a group of the Employer's employees who previously had not been covered by it, but rather who had been covered by a now-expired national agreement with the National Union.

We conclude that the Employer was under no Section 8(a)(5) obligation to apply the local agreement to a separate unit of employees never before included in that local unit and therefore, the Employer was privileged to refuse to apply that contract to this unit of employees. Accordingly, the charges against the Employer should be dismissed, absent withdrawal. Further, while the Employer was not obligated to comply with the Local's request to apply the local agreement to this separate unit of its employees, the Local's request in that regard did not violate either Section 8(b)(1)(A) or (B) of the Act. Thus, the Union's request to apply the contract, without more, was not coercive and was based on the Union's reasonable, albeit ultimately unpersuasive, interpretation of the language of the local agreement. Therefore, the Region should also dismiss the charges against the Local, absent withdrawal.

FACTS

The pertinent facts in this matter are not in dispute. Eastern Heating and Cooling, Inc. (the Employer) is engaged in the business of servicing, updating, replacing, and maintaining commercial and industrial HVAC systems. About 20 percent of the Employer's work consists of new construction awarded pursuant to bid or direct negotiation.

The Employer and Plumbers Local 7 (the Local) have a collective bargaining relationship dating to the 1940's. For many years, the Employer operated as a "split" shop, meaning that a group of eight employees, out of a workforce of 40-50, worked under the terms of the Local's area agreement, while the remainder of the workforce, who performed identical work, were not covered by any contract and instead worked under terms established by the Employer.

In 1988, representatives of the Local and the National Plumbers Union (the National) jointly approached the Employer to cover all of its employees under a collective-bargaining agreement. The Employer was reluctant to include all its employees in the Local's wage scale. The parties reached an arrangement whereby the existing group of employees working under the Local's agreement would be "red circled" and remain under that agreement. The remainder of the workforce would be covered by the National's nationwide agreement with the Mechanical Service Contractors of America, with a modified "Schedule A" applicable only to the Employer. The National Agreement provided for the adoption of the wages, benefits, and employment terms contained in a local agreement, with exceptions to "rates of pay, fringes and benefits as negotiated per Schedule A". Schedule A, as relevant here, provided for wages equal to 75 percent of those in the Local Agreement, pension contributions made to the National, and employees' dues forwarded to the Local. The Employer provided its own health insurance and other benefits.

The parties continued this contractual relationship for the next 17 years without the Employer and National engaging in further bargaining. The Employer continued adjusting wages for its employees covered by the National Agreement to reflect 75 percent of the wages specified in successive agreements with the Local, and adjusted the amount of pension contributions in accordance with the rate specified in successive National Agreements. Both the Local and National Agreements are Section 8(f) multi-employer agreements with different multi-employer associations, and contain trade jurisdictions covering all of the Employer's employees.

The Employer has consistently applied successive Local Agreements to the "red-circled" employees. As a result of retirements among the employees, by May of 2003 the unit covered by the Local Agreement consisted of only one employee.

In May 2005,[1] the National informed the Employer that, after its then-current contract expired in August, it would no longer accord the Employer its own modified Schedule A. The Employer would have to accept the same Schedule A applicable to all upstate New York employers covered by the National Agreement.[2] The Employer preferred to keep its modified version of Schedule A, which allowed it to pay only 75 percent of the Local's wage. Bargaining between the Employer and the National did not resolve the matter, and the National allowed its collective bargaining relationship with the Employer to expire along with the 2001-2005 National Agreement.

The Employer has continued to apply the terms of the Local Agreement to the only employee who has been working under that agreement. The remaining employees work under the economic terms of the expired National Agreement and Schedule A, with pension contributions being held in escrow. The Employer also has ceased deducting and forwarding dues to the Local for those employees who had been covered by the National Agreement.

By letter dated August 1, the Local informed the Employer that it was obligated to apply the Local Agreement to "all HVAC service and maintenance work performed by Eastern employees." On August 22 and again on August 25, Local officials informed the Employer that it must either sign the National Agreement without the Schedule A concessions or come under the jurisdiction of the Local Agreement. The Local has not taken any other action to compel the Employer to apply the terms of its Local Agreement to the employees previously covered by the National Agreement. The National has also, through counsel, expressed to the Employer its opinion that the Employer is bound to the Local Agreement. Moreover, the Local benefit funds have written the Employer requesting payment, noting in one letter that payment would forestall any legal action.

On November 17, the Employer filed a petition in Case 3-RM-784. On November 21, an employee filed a decertification petition in Case 3-RD-1489. The Region is holding the petitions in abeyance as they are currently blocked by the Local's 8(a)(5) charge.

ACTION

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[1] Unless otherwise noted, all dates are in 2005.

[2] Generally, the Schedule A applied to most upstate New York employers required them to pay the Local Agreement wages and benefits.

We conclude that the historical exclusion of the larger group of the Employer's employees from the Local Agreement created a unit separate and apart from the unit covered by the Local Agreement, and therefore the Employer did not violate Section 8(a)(5) of the Act by refusing to apply the Local Agreement to the larger group of employees. We also conclude that the Local's request that the Employer apply its contract to these employees is neither "coercive" nor unreasonable, and thus not violative of Section 8(b)(1)(A) or (B) of the Act. The Region should therefore dismiss the charges in both Case 3-CA-25593 and Case 3-CB-8443, absent withdrawal.[3]

The resolution of the Section 8(a)(5) charge requires a determination of whether the Employer's employees comprise a single unit or two distinct units. In light of the parties' unique bargaining relationship dating back to the 1940's, we conclude that the Employer's employees comprised two separate units. Thus, it is clear that the initial relationship prior to 1988, when only eight of the Employer's 40-50 employees were covered under the Local Agreement while the remainder remained unrepresented, involved two totally distinct employee groups. Moreover, the subsequent arrangement, reached in 1988, maintained and formalized that historical division when the parties agreed to two ostensibly separate collective-bargaining agreements. Under this arrangement, the Local Agreement continued to cover the smaller group, and the National Agreements as supplemented with Schedule A covered the larger group. The import of this arrangement was the continuation of the historical two-tiered wage system while placing the larger group under union representation.

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[3] [*FOIA Exemption 5*

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Viewed against this historical backdrop, the Local's current demand that all the employees be covered by its contract is similar to a request for an accretion. The facts discussed above would compel a finding that there have always been two separate units, both because the group of employees formerly covered by the National Agreement is larger than the one-person unit covered by the Local Agreement,[4] and because the Board will not find a single unit where "the group sought to be accreted has been in existence at the time of the recognition or certification, yet not covered in an ensuing contract...."[5] Here, the larger group existed at the time of recognition but was not covered by the Local Agreement, further indicating that in 1988, the two contracts covered two distinct units.

The Local argues that the Employer's employees comprised a single unit of employees, noting first that all the employees perform the same work and are members of the Local. Moreover, in the Local's view, the arrangement negotiated in 1988 did not create separate units or contracts, but rather consolidated all the Employer's employees into one unit covered by an 8(f) contract. Thus, the National Agreement supposedly is only a supplement to the Local Agreement. The Local points to the fact that the National Agreement specifically refers to and relies upon the Local Agreement for its basic terms. For example, Article XII, paragraph 35 states that "For all Employees covered by this Agreement wage rates, contribution or deductions for fringe benefit plans, programs, or funds, union dues, vacations, holidays, sick pay, 'shall be in accordance with the established local agreement.'" In addition, any exemptions to this provision, such as were made for this Employer, must be made pursuant to Article XXI of the National Agreement, which refers to its Schedule A. In light of this asserted interrelationship of the three documents (the Local Agreement, National Agreement, and Schedule A), the Local argues that they form only one agreement that contemplates a two-tiered wage system for the Employer's employees.

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[4] Superior Protection Inc., 341 NLRB 267, 268 (2004) (accretion inappropriate if employees at new facilities numerically overshadow employees at existing facility); Renaissance Center Partnership, 239 NLRB 1247 (1979) (same).

[5] United Parcel Service, 303 NLRB 326, 327 (1991), enfd. 17 F.3d 1518 (D.C. Cir. 1994) cert. denied 513 U.S. 1076 (1995).

We do not agree that the interrelationship of these contractual documents, or the terms therein, override the historical fact that these parties have always treated the Employer's employees as two separate units. Thus, neither the employees' nominal membership in the Local, nor the fact that they perform the same work as the one employee who is currently covered by the Local Agreement, overcomes the 60-year historical relationship that excluded the larger group of employees from the Local Agreeement.[6] Neither the Local Agreement nor the National Agreement, separately or in combination, provided for a "return" of these employees to the terms of the Local Agreement if the National Agreement no longer covers the larger group of the Employer's employees. While the National Agreement did incorporate most terms of the Local Agreement by reference, that 8(f) agreement has expired. Moreover, the Local Agreement, the only surviving agreement between the parties, does not incorporate the National Agreement in any manner.

In all these circumstances, we conclude that the Employer was privileged to refuse to apply the Local Agreement to its employees who previously had been unrepresented or covered by the National Agreement. Accordingly, the Region should dismiss the charge against the Employer, absent withdrawal.

We also conclude that the Region should dismiss the charge against the Local. As to the 8(b)(1)(A) allegation, a union does not act coercively by attempting to apply an existing contract to another group of an employer's employees, especially where there is a reasonable basis for the inclusion of those employees in the unit.[7]

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[6] See Kaiser Foundation Hospitals, 343 NLRB No. 8, slip op. at 1 (2004), citing United Parcel Service, 303 NLRB 326, 327 (1991), enfd. 17 F.3d 1518 (DC Cir. 1994), cert. denied 513 U.S. 1076 (1995) (addition of individuals into bargaining unit not lawful if they have been historically excluded from unit, regardless of their alleged community of interest with unit employees).

[7] Teamsters Local 988 (Emery Worldwide), 303 NLRB 306 (1991) (not unlawful to seek arbitration of claim that separate bargaining units of employer and its subsidiary had merged when both were purchased by another company that integrated their operations; there was reasonable basis for union's contention that merger had occurred since employees of both units now performed similar work, out of same terminals, and with common supervision). See also Hotel & Restaurant Employees Local 274 (Warwick Caterers), 282 NLRB 939, 940 (1987) (the filing of a grievance alleging that new employees are an accretion to the unit and covered by an

Initially, it is questionable whether the Local's conduct would constitute coercion under Section 8(b)(1) at all.[8] Thus far, the Local has only asked the Employer to apply the Local Agreement to the remaining employees. Further, even if we were to establish that the benefit fund acted as an agent of the Local by sending the letter noting the Employer's legal obligations, this would not constitute coercion under Section 8(b)(1)(A). Both were merely requests with no conduct and, as discussed below, those requests were reasonably based.

Secondly, the Local's request was reasonably based notwithstanding our conclusion that the Employer was not obligated to apply the Local Agreement to this separate unit of employees. The Local Agreement specifically covers all of the Employer's employees in its trade jurisdiction clause; the Local's interpretation of the National Agreement as a mere supplement to the Local Agreement is not frivolous; and all of the Employer's employees are members of the Local, work in the same facility, and perform the same job functions. Thus, it was a reasonable assertion, albeit ultimately unpersuasive, that the Local Agreement covers all the Employer's employees in one unit.

For the same reasons, there is no basis here for a Section 8(b)(1)(B) allegation. There can be no violation of Section 8(b)(1)(B) unless there is coercion of an employer in the selection of its "representatives for the purpose of collective bargaining or the adjustment of grievances." 29

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existing collective-bargaining agreement did not violate the Act where the Board had not yet determined that the employees were not in the unit); Stage Employees IATSE Local 695 (The Vidtronics Company), 269 NLRB 133 (1984).

[8] See Bakery Workers Local 6 (Stroehmann Bakeries), 320 NLRB 131, 138 (1995), relying on NLRB v. Teamsters Local 639 (Curtis Bros.), 362 U.S. 274 (1960), where Board held that even if a preempted lawsuit sought to impose union representation on employees absent majority support, like picketing in Curtis Bros., it would not reasonably tend to restrain employees in the exercise of their Section 7 rights. But cf. Elevator Constructors Local 1, 214 NLRB 257 (1974) (a demand by union that employer distribute overtime only to union members, without new right five words more, violates Section 8(b)(1)(A)). We also conclude that it is not "legal coercion" for the Local to have filed this non-frivolous unfair labor practice charge.

U.S.C. 158(b)(1)(B).[9] A primary concern of Congress in enacting Section 8(b)(1)(B) was to "prevent unions from trying to force employers into or out of multi-employer bargaining units."[10] There is no evidence that the Local has coerced the Employer in its choice of bargaining representative, and its position regarding the application of the Local Agreement to all of its employees, which might require the Employer to accept the results of multi-employer bargaining for all its employees and not just the remaining one, is reasonable.

In these circumstances, the Region should dismiss the charge against the Local, absent withdrawal.

B.J.K.

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[9] NLRB v. Electrical Workers Local 340 [Royal Electric], 481 U.S. 573, 125 LRRM 2305 (1987).

[10] Florida Power & Light Co. v. NLRB, 417 U.S. 790, 803 (1974).